17-676

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 243.

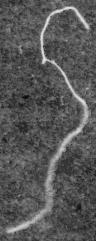
THE FIRST NATIONAL BANK OF XENIA, OHIO, PLAINTIFF IN ERROR,

vs.

DANIEL M. STEWART AND MARTHA N. McMILLAN, ADMINISTRATORS OF THE ESTATE OF DANIEL McMILLAN, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED JULY 22, 1880.



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INDEX.

	Original.	Print.
Petition	2	1
Summons	4	2
Marshal's return	6	2
Answer	7	3
Reply to answer	10	4
Journal entry: Jury sworn	12	5
Verdict	13	5
Bill of exceptions allowed	13	5
Bill of exceptions	15	6
Journal entry: Offer of remitter refused, judgment for plaintiff	18	7
Supersedeas bond	20	7
Citation	22	8
Writ of error	24	8
Clerk's certificate	25	9

1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court rooms in the city of Cincinnati on the first Tuesday of February, being the third day of that month, in the year of our Lord one thousand eight hundred and eighty and of the Independence of the United States of America the one hundred and fourth—present, the honorable Philip B. Swing, district judge—among the proceedings had were the following, to wit:

DANIEL M. STEWART AND MARTHA N. McMILLAN, adm'rs of the estate of Daniel McMillan, deceased,
vs.
THE FIRST NATIONAL BANK OF XENIA, O. } 2769. Money.

Be it remembered that heretofore, to wit, on the fifth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, came the plaintiffs, Daniel M. Stewart and Martha N. McMillan, adm'rs, etc., by George Hoadly and Henry M. Cist, their attorneys, and filed in the clerk's office of the court aforesaid their certain petition in this cause, clothed in the words and figures following, to wit:

2 *Petition.*

United States circuit court, southern district of Ohio.

DANIEL M. STEWART AND MARTHA N. McMILLAN, administrators of the estate of Daniel McMillan, deceased, plaintiffs,
vs.
THE FIRST NATIONAL BANK OF XENIA, O., defendant. } No. 2769.

The above-named Daniel M. Stewart and Martha N. McMillan now come and represent to the court that they are the duly appointed administrators of the estate of Daniel McMillan, deceased, late of Hamilton County, Ohio, by order of the probate court of said Hamilton County, Ohio, and that they are legally qualified and are now acting as such. That said defendant, The First National Bank of Xenia, is a duly incorporated banking organization under and by virtue of the national banking act of the United States, and against whom suits may be brought in this court.

3 These plaintiffs further say that said defendant being in possession of thirty shares of the capital stock of said The First National Bank of Xenia belonging to the said Daniel McMillan, on or about the 24th day of October, 1876, unlawfully and without warrant of law appropriated said thirty shares of capital stock as aforesaid to its own use, and on or about said 24th day of October, 1876, sold and converted said shares into cash, receiving for the same the sum of forty-two hundred dollars, which said sum said bank has, without any authority whatsoever, wholly appropriated to its own use and refuses to account for the same or to de-

liver the same over to these plaintiffs, administrators as aforesaid, as in law bound to do, although demand has been made on said bank by them for the same.

Wherefore these plaintiffs pray judgment against the said defendant for said sum of forty-two hundred dollars, with interest thereon from the 24th day of October, 1876, and for costs of suit herein expended.

GEORGE HOADLY & HENRY M. CIST,
Att'ys for Plaintiffs.

4 THE STATE OF OHIO,
Green County, ss:

Daniel M. Stewart, being duly sworn, says that he is one of the administrators of Daniel McMillan, deceased, plaintiffs herein, and that the facts set forth in the foregoing petition are true, as he verily believes.

D. M. STEWART.
Administrator of D. McMillan, D'c'd.

Sworn to before me and subscribed in my presence this 4th day of October, 1878.

ABNER S. BUCK,
Notary Public, Green Co., Ohio.

Which said petition was indorsed as follows: Action for money only. Amount claimed, $4,200.00, with interest thereon from 24th day of October, 1876.

And thereupon there was issued out of the clerk's office of the court aforesaid our certain writ of summons, directed to the marshal of this district and against the said defendant, clothed in the words and figures following, to wit:

5 UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon The First National Bank of Xenia, O., in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the fourth Tuesday in the month of October, 1878, to answer unto Daniel M. Stewart and Martha N. McMillan, administrators of Daniel McMillan, deceased, citizen of and resident in the State of Ohio, in civil action for money, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 5th day of October, A. D. 1878, and in the 103d year of the Independence of the United States.

[SEAL.] Attest: THOMAS AMBROSE, *Clerk.*

6 (Endorsed:) Civil action for the recovery of money only. Amount claimed, $4,200, with interest thereon from 24th day of October, 1876, for which judgment may be taken unless you answer on or before Nov. 5, 1878.

And afterward, to wit, on the 12th day of October, in the year last aforesaid, came the marshal to whom the said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid with his proceedings endorsed thereon in the words and figures following, to wit:

Received this writ at Cincinnati, Oct. 8, 1878, and served the same in Green County, Ohio, as follows, to wit, on the within-named First National Bank of Xenia, by delivering a true copy thereof to Andrew H. Baughman and Alfred Tioder personally, respectively president and cashier of the within-named First National Bank of Xenia, O., on the 10th day of October, A. D. 1878.

W. R. THRALL,
U. S. Marshal.
By S. TIFFANY, *Deputy.*

7 And afterward, to wit, on the 21st day of October, in the year last aforesaid, came the defendant, by Little and Shearer, its attorneys, and filed in the clerk's office of the court aforesaid its certain answer to the petition herein, clothed in the words and figures following, to wit:

Answer.

In the circuit court of the United States for the southern district of Ohio.

DANIEL M. STEWART AND MARTHA M. McMillan, administrators of the estate of Daniel McMillan, deceased, plaintiffs,
vs.
THE FIRST NATIONAL BANK OF XENIA, OHIO, defendants.
} No. 2769.

On the day of April, A. D. 1876, said Daniel McMillan, then in life, was indebted to the defendant upon a debt previously contracted in good faith, to an amount greater than the value of said certificates of stock.

8 He, the said Danil McMillan, being then and there unable to furnish other security, and the security of such certificates being necessary to secure the defendant from loss in the premises, he, the said McMillan, delivered said certificates, together with other securities, to the defendants as collateral security for such indebtedness, and on or about the 24th day of October, A. D. 1876, said indebtedness being still unsatisfied and overdue, the defendant sold said stock at its full market value & applied the proceeds thereof, as well as the proceeds of said other securities, as a credit upon said indebtedness, in due course of business; after such application there still remained due the defendant on such indebtedness a large amount of money, all which is still unpaid.

Defendant admits its corporate existence, and denies all and singular the other allegations of the petition not herein expressedly admitted.

Wherefore defendant prays to be dismissed and to recover
9 its reasonable costs.

By LITTLE AND SHEARER,
Def't's Att'ys.

THE STATE OF OHIO,
Green County, ss:

Alfred Trader, being sworn, says that the defendant in the above-entitled action is a corporation, and he is the cashier thereof; and that he believes the facts stated in the foregoing pleading to be true.

A. TRADER.

Signed in my presence and sworn to before me this 19th day of October, A. D. 1878.

[SEAL.]

W. F. TRADER,
Notary Public, Green Co., Ohio.

And afterward, to wit, on the 5th day of November, in the year last aforesaid, came the said plaintiffs by their said attorneys, and filed in the clerk's office of the court aforesaid their certain reply to the answer herein, clothed in the words and figures following, to wit:

10 *Reply.*

In the circuit court of the United States for the southern district of Ohio.

DANIEL M. STEWART AND MARTHA MCMILLAN, administrators of the estate of Daniel McMillan deceased, plaintiffs,
against
THE FIRST NATIONAL BANK OF XENIA, OHIO, defendant.
} No. 2769.

And now come the above-named plaintiffs, and for the reply to the answer herein filed by the defendant, say that they deny that said Daniel McMillan delivered said certificates to the defendant as collateral security for the indebtedness as set forth in answer, and plaintiffs deny that in law said defendant had the right to receive said certificates as such collateral security as aforesaid.

They further deny that said defendant had the right to sell said certificates of stock as set forth in the answer herein, and deny that said defendant had the right to apply the proceeds of sale thereof upon
11 said indebtedness as aforesaid as a credit thereon.

GEORGE HOADLY AND
HENRY M. CIST,
Attorneys for Pl'ffs.

THE STATE OF OHIO,
Green County, ss:

Daniel M. Stewart, being duly sworn, says that he is one of the plaintiffs herein, as administrator of Daniel McMillan, deceased, and that the facts set forth in the foregoing reply are true, as he verily believes.

D. M. STEWART.

Sworn to before me, and subscribed in my presence this 1st day of Nov., 1878.

[SEAL.]

ABNER I. BUCK,
Notary Public, Green Co., Ohio.

And afterwards, to wit, on the 10th day of February, in the year of our Lord one thousand eight hundred and eighty, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

12 DANIEL M. STEWART ET AL., ADMINISTRATORS of Daniel McMillan,
vs.
THE FIRST NATIONAL BANK OF XENIA, O. } Money. 2769.

This day came the parties, by their attorneys, and thereupon to try the issue, a jury being called, came, to wit, John L. Martin, James Ingram, James McMillan, A. P. Osborn, Charles M. Gross, W. McK. Pine, John Bailey, John Dewing, J. Scott Peebles, David Bates, John N. Lodwick, and R. P. Iams, who were duly empaneled and sworn well & truly to try the issue joined between the parties, and having heard the evidence, the argument of counsel, and the charge of the court, retired to their room, attended by an officer of this court, to deliberate upon a verdict.

And afterwards, to wit, on the 11th day of February, in the year last aforesaid, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

13 D. M. STEWART, ET AL., ADM'S.
vs.
THE FIRST NATIONAL BANK OF XENIA, O. } 2769. Money.

This day again came the parties by their attorneys, and also the jurors heretofore empaneled and sworn herein, who upon their oaths do find the issue to be in favor of the plaintiffs, and do assess their damages by reason of the premises at five thousand & twenty-six dollars, whereupon the defendant, by its attorneys, gives notice of a motion for a new trial.

And afterwards, to wit, on the 19th day of March, in the year last aforesaid, a further entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

D. M. STUART AND MARTHA MCMILLAN, Administrators of the estate of Daniel McMillan, deceased,
vs.
THE FIRST NATIONAL BANK OF XENIA, O., def'ts. } 2769. Money.

14 This day this cause came on to be heard, upon said motion for a new trial, and was *agreed* by counsel, on consideration whereof the court overrules said motion, to which action of the court the defendant by its counsel excepts.

And thereupon the defendant tendered its certain bill of exceptions taken during the trial of the case, and prayed that the same be ordered to be made a part of the record in the case. It is accordingly ordered by the court that said bill of exceptions be, and the same is hereby, made a part of the record in this case. Thereupon the defendant moves the court for a

judgment for the defendant notwithstanding the verdict of the jury in this cause, which motion is overruled by the court.

To which overruling of its motion the defendant excepts.

Which said bill of exceptions is clothed in the words and figures following, to wit:

15 *Bill of exceptions.*

Circuit court of the United States in and for the southern district of Ohio

DANIEL M. STEWART AND MARTHA N. McMillan, administrators of Daniel McMillan, deceased, pl'ffs,
vs.
THE FIRST NATIONAL BANK OF XENIA, O.

Be it remembered that on the trial of this cause at the February term of said court, A. D. 1880, the defendant, to maintain the issues upon its part, introduced testimony which tended to show that said Daniel McMillan, the plaintiff's intestate, on the day of 1876, delivered to the defendant the bank stock in controversy as collateral security on account of money loaned by said defendant to said Daniel McMillan, at the time, or before such delivery, and that said collateral continued to be so held by the defendant until October 24th, 1876, after the maturity of such loan or loans, when it was sold by
16 said defendant at its market value, and the proceeds of sale applied to the payment of such indebtedness, leaving a balance still due the defendant. And plaintiffs offered testimony tending to show that said bank stock was given, not as col'atteral security to a pre-existing debt, or in order to secure the same, but was given as collateral to a note for $2,600, to which it was attached and with which it was delivered to said bank at the time of the discount of said note by said bank, and as security therefor. The question of the right and power of the defendant to receive its own stock as pledge for a present loan, and the further question of the plaintiff's right in this suit to set up such defense, being fully argued by counsel for the respective parties, the court upon the points thus presented in argument and evidence charged the jury in substance that if they found from the evidence that the bank stock in ques-
17 tion was delivered by said McMillan to said defendant as a pledge or collateral for a present loan of money, made at the time of such delivery by said defendant to said McMillan, the plaintiffs had the right to recover the amount of the proceeds of the sale of said stock, with interest from the time of sale, for the defendant was prohibited by the currency act from thus receiving its own stock; to which charge the defendant, by its counsel, then and there excepted and tendered this its certain bill of exceptions in the premises, and prayed the court to allow, sign, and seal the same, & order it to be made a part of the record in this cause, which is done accordingly.

PHILIP B. SWING, [SEAL.]
U. S. District Judge S. D. O., sitting and holding the Circuit Court for said District.

And afterward, but on the same day in the year last aforesaid, an
18 entry was made upon the journal of said court in said cause clothed in the words and figures following, to wit:

DANIEL M. STEWART AND MARTHA N. McMILLAN, administrators of the estate of Daniel McMillan, deceased,
vs.
THE FIRST NATIONAL BANK OF XENIA, OHIO. } 2769. Money.

And now come the plaintiffs above mentioned and offer here in open court to remit one hundred dollars of the verdict heretofore entered herein, and the defendant objecting thereto, the court refused to allow plaintiffs to make such remitter; to all of which said plaintiffs here except. It is by the court therefore considered that the plaintiffs, Daniel M. Stewart and Martha N. McMillan, administrators of the estate of Daniel McMillan, deceased, recover of the said defendant, The First National Bank of Xenia, Ohio, the said sum of five thousand and twenty-six dollars, their damages aforesaid, in form aforesaid assessed, together with inter-
19 est thereon from February 3rd, 1880, and their costs herein expended to be taxed, and execution is awarded therefor.

And afterward, to wit, on the twenty-eighth day of April, in the year last aforesaid, came the said defendant, by its said attorneys, and filed in the clerk's office of the court aforesaid its certain supersedeas bond herein, clothed in the words and figures following, to wit:

20 Circuit court of the United States for the southern district of Ohio.

DANIEL M. STEWART ET AL., ADMI'S,
vs.
FIRST NATIONAL BANK OF XENIA, OHIO.

Know all men by these presents that we, A. H. Baughman, A. Trader, and H. H. Eavey, are held and firmly bound unto Daniel M. Stewart and Martha N. McMillan, administrators of the estate of David McMillan, deceased, in the sum of eleven thousand dollars, to be paid to the said Daniel M. Stewart and Martha N. McMillan, administrators as aforesaid, their executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 26' day of April, 1880.

Whereas the above named The First National Bank of Xenia, Ohio, hath sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by
21 the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above named The First National Bank of Xenia, Ohio, shall prosecute its said writ of error to effect, and answer all damages, costs, if it shall fail to make

good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

A. H. BAUGHMAN. [SEAL.]
A. TRADER. [SEAL.]
H. H. EAVEY. [SEAL.]

Sealed and delivered in presence of—
JOHN LITTLE.
C. C. SHEARER.

The above security is approved.

PHILIP B. SWING,
District Judge of the United States, S. D. Ohio.

22 THE UNITED STATES OF AMERICA, *ss:*

To Daniel M. Stewart and Martha N. McMillan, administrators of the estate of Daniel McMillan, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein The First National Bank of Xenia, Ohio, plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 15' day of July, in the year of our Lord one thousand eight hundred and eighty.

PHILIP B. SWING,
District Judge, S. D. O.,
Sitting and holding the Circuit Court for said District,
No Circuit Judge or Circuit Justice being present.

23 CINCINNATI, *July 20th*, 1880.

Service of the within writ hereby acknowledged for defendants in error.

HOADLY, JOHNSTON & COLSTON,
HENRY M. CIST,
Att'ys for Defendants in Error.

Received this writ at Cincinnati, Ohio, July 20th, 1880, and on that same day return the same "Service acknowledged," as above.

J. C. ULLEY, *U. S. M., S. D. O.,*
By T. M. TURNER, *Deputy.*

Service, 2.00; 2 copies, 1.00; 2 miles, .12—$3.12.

(Indorsed:) United States court. No. 2769. Daniel M. Stewart et al., adm'rs, vs. First Nat. Bank of Xenia, O. Citation to defendant in error. Filed July 20th, 1880. Wm. C. Howard, clerk. Taft & Lloyd & Little & Shearer.

24 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, greeting:

Because in the records and proceedings, and also in the rendition of the

judgment of a plea which is in the said circuit court before you, between Daniel M. Stewart et al., administrators, and The First National Bank of Xenia, O., a manifest error hath happened, to the great damage of the said The First National Bank of Xenia, Ohio, as by its complaint appears: We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 16th day of July, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.]

W. C. HOWARD,
Clerk of the Circuit Court of the U. S., S. D. O.

(Indorsed:) United States circuit court. No. 2769. Daniel M. Stewart et al., adm'rs, vs. First Nat. Bank of Xenia, Ohio. Writ of error. Filed July 20th, 1880. Wm. C. Howard, clerk.

25 THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, William C. Howard, clerk of the circuit court of the United States for the southern district of Ohio, hereby certify the foregoing to be a true and correct transcript of the record and proceedings in the case wherein Daniel M. Stewart et al. are plaintiffs, and The First National Bank of Xenia, O., is defendant, as the same remain in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati, this 14th day of June, A. D. 1880, and in the one hundred and fourth year of the Independence of the United States of America.

Attest:

[SEAL.]

W. C. HOWARD,
Clerk U. S. Cir. C'rt, S. D. O.

(Indorsement on cover:) No. 243. The First National Bank of Xenia, Ohio, plaintiff in error, vs. Daniel M. Stewart and Martha N. McMillan, administrators of the estate of Daniel McMillan, deceased. S. Ohio C. C. U. S. Filed 22d July, 1880.

1 # ADDITION TO RECORD No. 243.

Supreme Court of the United States.

THE FIRST NATIONAL BANK OF XENIA, PL'FF,
v.
DANIEL M. STEWART & MARTHA N. McMILLAN, administrators of the estate of Daniel McMillan, deceased, def'ts. } No. 243.

By consent of the parties to this cause, and it appearing to the court that by clerical mistake and oversight of the clerk of the court below the motion of said The First National Bank of Xenia for a new trial was omitted from the transcript and record filed herein, it is ordered that said bank have leave to file herein a certified copy of said motion, and that when so filed the same shall be taken & held to be a part of said transcript and record the same as if originally embraced therein.

2 Agreed to.

HOADLY, JOHNSON & COLSTON,
Att'ys Def't in Error.
LITTLE & SHEARER,
Att'ys for Pl'ff in Error.

3 Circuit court of the United States, southern district of Ohio.

Motion for new trial.

D. M. STEWART AND MARTHA N. McMILLAN, administrators of Daniel McMillan, deceased,
against
THE FIRST NATIONAL BANK OF XENIA, OHIO, defendant. } No. 2769.

Now comes the defendant and moves the court for a new trial in this action for the following reasons, to wit:

First. That the verdict of the jury in the case is not sustained by sufficient evidence.

Second. That the verdict of the jury in the case is contrary to law.

Third. That the damages given by the jury in the case are excessive and appear to have been given under the influence of prejudice.

Fourth. That there was error of law occurring at the trial of the
4 case, and excepted to at the trial by the defendant, in the charge of the court to the jury, to the prejudice of the defendant.

Fifth. That the verdict of the jury should have been for the defenantd and not for the plaintiff.

Feb. 11, 1880.

LITTLE & SHEARER, &
TAFT & LLOYD,
For Defendant.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, William C. Howard, clerk United States circuit court within and for the southern district of Ohio, do hereby certify that the foregoing is a true and correct copy of the original motion for a new trial filed in the clerk's office of said court in the above-entitled cause.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati, O., this 8th day of February, A. D. 1883.

[SEAL.]

WM. C. HOWARD, *Clerk*,
By ROB. C. GEORGI, *Deputy*.

(Indorsed:) No. 2769. U. S. cir. court, S. D. O. D. M. Stewart & Martha N. McMillan vs. The First Nat'l Bank of Xenia, O. Motion for a new trial. Filed Feb. 11th, 1880. William C. Howard, clerk. Little & Shearer, Taft & Lloyd, for def't.

(Indorsed:) Supreme Court U. S. 1882, October term. No. 243. The First National Bank of Xenia, pl'ff in error, vs. Daniel M. Stewart et al., adm'rs, &c. Stipulation of counsel & addition to record. Filed 17th Mar., 1883.

(Stamped:) Office Supreme Court U. S. Filed Mar. 17, 1883. James H. McKenney, clerk.

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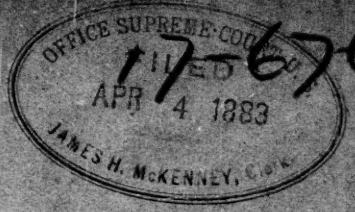


17-676

SUPREME COURT OF THE UNITED STATES.

THE FIRST NATIONAL BANK, OF XENIA, O.,
PLAINTIFF IN ERROR.

vs.

DANIEL M. STEWART AND MARTHA N. McMILLAN,
Administrators of the Estate of Daniel McMillan, Dec'd.
DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN LITTLE, of Little & Shearer, for Plaintiff in Error.

GAZETTE PRESS, XENIA, OHIO.

Fifth. That the verdict of the jury should have been for the defenantd and not for the plaintiff.

Feb. 11, 1880.

LITTLE & SHEARER, &
TAFT & LLOYD,
For Defendant.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, William C. Howard, clerk United States circuit court within and for the southern district of Ohio, do hereby certify that the foregoing is a true and correct copy of the original motion for a new trial filed in the clerk's office of said court in the above-entitled cause.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati, O., this 8th day of February, A. D. 1883.

[SEAL.] WM. C. HOWARD, *Clerk*,
By ROB. C. GEORGI, *Deputy*.

(Indorsed:) No. 2769. U. S. cir. court, S. D. O. D. M. Stewart & Martha N. McMillan vs. The First Nat'l Bank of Xenia, O. Motion for a new trial. Filed Feb. 11th, 1880. William C. Howard, clerk. Little & Shearer, Taft & Lloyd, for def't.

(Indorsed:) Supreme Court U. S. 1882, October term. No. 243. The First National Bank of Xenia, pl'ff in error, vs. Daniel M. Stewart et al., adm'rs, &c. Stipulation of counsel & addition to record. Filed 17th Mar., 1883.

(Stamped:) Office Supreme Court U. S. Filed Mar. 17, 1883. James H. McKenney, clerk.

17-676

SUPREME COURT OF THE UNITED STATES.

THE FIRST NATIONAL BANK, OF XENIA, O.,
PLAINTIFF IN ERROR.

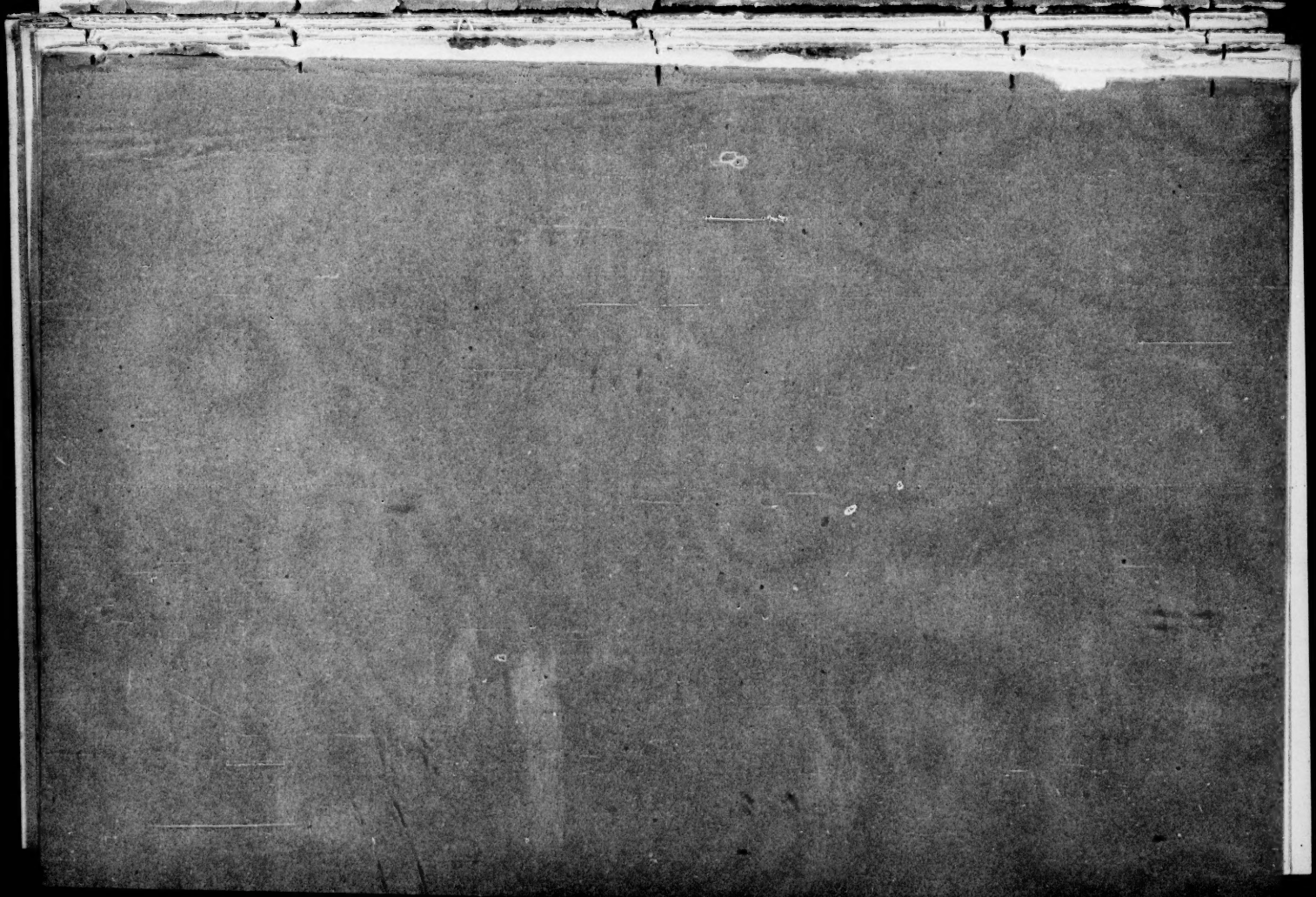
vs.

DANIEL M. STEWART AND MARTHA N. McMILLAN,
Administrators of the Estate of Daniel McMillan, Dec'd.
DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN LITTLE, of Little & Shearer, for Plaintiff in Error.

GAZETTE PRESS, XENIA, OHIO.



SUPREME COURT OF THE UNITED STATES.

THE FIRST NATIONAL BANK, OF XENIA, O.,
Plaintiff in Error.

vs.

DANIEL M. STEWART AND MARTHA N. McMILLAN, Administrators of the Estate of Daniel McMillan, Deceased, Defendants in Error.

No. 243.

Now comes said plaintiff in error and assigns error in the record, proceedings and judgment of the Circuit Court for the Southern District of Ohio, in the cause wherein this plaintiff was defendant and said defendants were plaintiffs, as follows:

I. Said Circuit Court erred in its charge to the jury, as elsewhere set forth in this record, and excepted to by this plaintiff at the time.

II. Said Circuit Court erred in overruling this plaintiff's motion for a new trial, as appears by the bill of exceptions herein.

III. Said Circuit Court erred in rendering judgment for the defendants herein, when by the law of the land, and upon the pleadings in the cause, judgment should have been rendered in favor of this plaintiff.

Said plaintiff in error therefore prays a reversal of said judgment of said Circuit Court, and that it may be restored to all things it has lost by reason thereof.

JOHN LITTLE,
Of Little & Shearer, Attorney for Pl'ff in Error.

SUPREME COURT OF THE UNITED STATES.

THE FIRST NATIONAL BANK, OF XENIA, O.,
PLAINTIFF IN ERROR.

vs.

DANIEL M. STEWART AND MARTHA N. McMILLAN,
Administrators of the Estate of Daniel McMillan, Dec'd.
DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

The action below was brought October 5th, 1878, by the administrators of the estate of Daniel McMillan, deceased, against the First National Bank, of Xenia, Ohio, to recover the value of thirty shares of the capital stock of the Bank, alleged to have been wrongfully appropriated, October 24th, 1876, and sold by the Bank, and the proceeds of sale converted to its own use; the same being, at the time, the property of their intestate, Daniel McMillan.

THE ANSWER

Set up in substance that, in April, 1876, McMillan was indebted to the Bank, in a sum largely in excess of the value of said stock, on account of a debt *previously contracted* in good faith, and that he, being unable to furnish other sufficient security, delivered to the Bank, the stock as collateral security for such indebtedness; and that on October 24th, 1876, such indebtedness being still unpaid, the Bank sold the stock at its full value, and applied the proceeds of sale to the payment of the debt—there remaining still a balance unpaid after such application.

THE REPLY

Denied that "said Daniel McMillan, delivered said certificates [of stock] to defendant as collateral security for the indebtedness, *as set forth in the answer.*" It also denied the legal right of the Bank to hold the stock as collateral, and sell it, and apply the proceeds to the payment of the debts.

Upon the issues thus made up, the case went to trial February 11th, 1880, and a verdict was returned for the plaintiff for $5,026.

1. There was error in the charge of the Court to the jury. As the Bill of Exceptions disclosing the error (as we think) is short, it is inserted in full, omitting formal parts:

"Be it remembered that on the trial of this cause at the February Term of said Court, A. D. 1880, the defendant, to maintain the issues upon its part, introduced testimony which tended to show that said Daniel McMillan, the plaintiffs' intestate, on the day of , 1876, delivered to the defendant, the bank stock in controversy, as collateral security on account of money loaned by said defendant to said Daniel McMillan, at the time, or before such delivery, and that said collateral continued to be so held by the defendant until October 24th, 1876, after the maturity of such loan or loans, when it was sold by said
16 defendant at its market value, and the proceeds of sale applied to the payment of such indebtedness, leaving a balance still due the defendant. And plaintiffs offered testimony tending to show that said bank stock was given, not as collateral security to a pre-existing debt, or in order to secure the same, but was given as collateral to a note for $2,600, to which it was attached and with which it was delivered to said bank at the time of the discount of said note by said bank, and as security therefor. The question of the right and power of the defendant to receive its own stock as a pledge for a present loan, and the further question of the plaintiffs' right in this suit, to set up such defense being fully argued by counsel for the respective parties, the Court, upon the points thus presented in argument and evidence, charged the jury in substance, that if they found from the evidence that the bank stock in question was delivered by said McMillan
17 to said defendant as a pledge or collateral for a present loan of money, made at the time of such delivery by said defendant to said McMillan, the plaintiffs had the right to recover the amount of the proceeds of the sale of said stock, with interest

from the time of sale, for the defendant was prohibited by the currency act, from thus receiving its own stock; to which charge the defendant, by its counsel, then and there excepted and tendered this its certain bill of exceptions in the premises, and prayed the Court to allow, sign and seal the same, and order it to be made a part of the record in this cause, which is done accordingly."

(*a*) What might have been the rights of McMillan—and his administrators simply succeed to them—*before* the execution of contract of conditional sale, or whether they would be the same as *after* the execution of the contract, need not perhaps be considered. But *after* the contract for the sale of the security was carried out by the Bank, it was too late to complain, or to raise the question of *ultra vires*.

Hayes et al. v. Galion Gas Light and Coke Co. 29 O. S., 330, 340.

Whitrey Arms Co. v. Barlow et al., 63 N. Y., 62, 69.

Chester Glass Co. v. Dewey, 16 Mass , 102.

Atlantic Delaine Co. v. James, 94 U. S., 207.

Scholey v. Rew, 23 Wall., 331.

(*b*) It is true the currency act forbids a National Bank from taking its own stock as collateral for a present loan; but it does not follow that the borrower can either avoid, or recover back the stock taken in pledge for, the loan. The law is quite to the contrary.

Harris v. Runnels, 12 Howard, 79.

O'Hare v. Bank, 78 Pa., 96.

Vinny et al. v. Bricker, 14 O. S. 331.

Gold Mining Co. v. National Bank, 96 U. S , 640.

National Bank v. Case, 99 U. S., 628.

National Bank v. Matthews, 98 U. S., 621.

National Bank v. Whitney, 103 U. S., 99.

(*c*) A National Bank is prohibited—by implication, but none the less effectually on this account, 96 U. S., 625—from taking a mortgage on realty to secure a present loan. Yet such a

mortgage is enforceable by the Bank. The prohibition, like other similar restrictions upon the powers of National Banks, is to be enforced by the United States alone.

Bank v. Matthews and
Bank v. Whitney, supra.

The principles recognized as the law and settled in these two cases, seem to us, determinative of the question arising upon the charge of the court in this case. If the mortgagor cannot defend against the mortgage, in such case, it is difficult to see how the pledgor of bank stock could defend against the pledge; and if the latter could not defend against the pledge, *a fortiori* could he not recover for the thing pledged, after the contract of sale had been fully executed.

It would seem to be the doctrine of the charge that the pledgor of bank stock can enforce the statutory prohibition, fix the penalty for disobedience at the amount of the pledge, and appropriate it to himself as a reward for teaching others to be law-abiding!

If Congress had intended that a borrower *in pari delicto* might be thus rewarded, it would have so enacted in terms, it is submitted.

2. The defendant below was entitled to a judgment upon the pleadings, notwithstanding the verdict. The reply was demurrable. It did not deny that the stock was left with the Bank as collateral, nor that it was duly sold for full value to pay the loan secured by it. That part of the answer that alleged the indebtedness, to secure which the stock was pledged, to be an antecedent one, was merely surplusage. The reply was in effect only a denial of this surplusage. The substantial portion of the answer was that which alleged the stock was left with the Bank as collateral security for a loan (whether past or present, was immaterial) and

that it was duly sold for full value, and the proceeds applied to the payment of the loan. This material portion, the reply did not deny. Facts sufficient therefore stood admitted by the pleadings, to entitle the Bank to a judgment, and it was error to render judgment upon the verdict against it, the insufficiency of the reply not being such as would be cured by verdict.

3. It has recently been held by this Court, that its jurisdiction could not be defeated by a party entering a remittitur against the objection of his adversary, as the defendants in error offered to do in this case.

Respectfully submitted,

JOHN LITTLE,

Of Little & Shearer, for Pl'ff in Error

17-676

Robert Clarke & Co., Printers, Cincinnati, O. [*March, 1883.*

IN THE

Supreme Court of the United States.

The First National Bank of Xenia, Ohio,
Plaintiff in Error,

No. 243.] *vs.*

Daniel M. Stewart and Martha N. McMillan, administrators of the estate of Daniel McMillan, deceased,
Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

ARGUMENT FOR DEFENDANTS IN ERROR.

By **HOADLY, JOHNSON & COLSTON,**
Their Attorneys.

Robert Clarke & Co., Printers, Cincinnati, O. [*March, 1883.*

IN THE

Supreme Court of the United States.

The First National Band of Xenia, Ohio,
Plaintiff in Error,

No. 243.] *vs.*

Daniel M. Stewart and Martha N. McMillan, administrators of the estate of Daniel McMillan, deceased.
Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

ARGUMENT FOR DEFENDANTS IN ERROR.

By HOADLY, JOHNSON & COLSTON,
Their Attorneys.

There are two questions in this case. The first relates to the jurisdiction of this Court, and the second to the merits of the controversy.

The action was brought by Stewart and McMillan, administrators, to recover forty-two hundred dollars and interest from October 24, 1876, for the conversion by the defendant, the First National Bank of Xenia, on that day, of thirty shares of its own capital stock, belonging to Daniel McMillan. (Record, page 1.) The answer (Record, page

2) claimed that, in April, 1876, Daniel McMillan, then in life, was indebted to the defendant, upon a debt previously contracted in good faith, to an amount greater than the value of said certificates of stock; that being unable to furnish other security, and the security of the said certificates of stock being necessary to secure the defendant from loss in the premises, he, McMillan. delivered said certificates of stock, with other securities, to the defendant, as collateral security for the debt, and that, on October 24, 1876, the indebtedness being still unsatisfied and overdue, the defendant sold the stock at its full value, and applied the proceeds thereof, and the proceeds of said other securities, as a credit upon said indebtedness, in due course of business, leaving a large amount due to the defendant on such indebtedness, which still remains unpaid. The reply (page 4) denies that the certificates were delivered to the defendant, as collateral security for the indebtedness, as set forth in the answer, and denies that the defendant had the right to receive said certificates as such collateral security, and denies that the defendant had the right to sell said certificates as set forth in the answer, and denies that the defendant had the right to apply the proceeds of the sale upon said indebtedness.

The issue was tried to Judge Swing and a jury, and a verdict rendered for the plaintiffs, (Record, page 5,) in the sum of $5,026 damages. The bill of exceptions (page 6) shows that the defendant, upon the trial, introduced testimony tending to show that McMillan delivered the bank stock as collateral security on account of money loaned to him

"at the time or before delivery,"

and that the collateral was held until after the maturity of

the loan, and until October 24, 1876, when it was sold at market value, and the proceeds applied to the payment of such indebtedness, leaving a balance still due the defendant. The plaintiff offered testimony tending to show that the bank stock was not given to secure a pre-existing debt, but as collateral to a note for $2,600, to which it was attached, and with which it was delivered to said bank at the time of the discount of said note by said bank, and as security therefor.

The Court charged the jury that if the bank stock were delivered by McMillan to the defendant as a pledge or collateral for a present loan, the plaintiffs had the right to recover the amount of the proceeds of the stock with interest, to which instruction the defendant excepted.

I.

The question of jurisdiction arises in this way: It does not appear, from the record, that the amount really in dispute exceeds $5,000. If the jury believed the testimony given for the plaintiffs, that the bank stock was given as collateral security to a debt for only $2,600, then the controversy in the case was limited to the sum of $2,600 and interest, and could not extend further. Before this Court can be asked to reverse the judgment, it must appear clearly and affirmatively, as we understand the authorities, that the amount in controversy is within the limits of this Court's jurisdiction, namely, is in excess of $5,000. Had the jury returned a special verdict, finding that the bank stock was given as collateral security for an amount which with interest would exceed $5,000, then the bank might well claim that the amount in dispute was certainly and affirmatively shown to be in excess of $5,000. But it is

perfectly consistent with the record in this case that this bank stock was pledged for $2,600 only, in which case the bank could not, upon any theory of law, claim to withhold from the administrators, for *pro-rata* distribution by them among the creditors of McMillan, the amount in excess of $2,600 and interest. We do not suppose it will be again claimed, whatever may be the decision upon the merits of this case, that a national bank can assert an implied lien on its own stock for its general balance. If a debtor to a national bank has pledged as collateral to a past debt, stock of such bank worth more than the amount of such debt, it cannot be claimed, in view of the explicit inhibition imposed in the laws of the United States upon national banks that they shall not become owners of their own stock, and of the decisions reported in *Bank* v. *Lanier*, 11 Wall. 369, and *Bullard* v. *Bank*, 18 Id. 589, that such bank can lawfully assert a lien, for a general balance accrued upon other accounts, against any surplus in value of such stock or its proceeds.

II.

The question upon the merits of this case is this: Can the administrator of a party, who has pledged to a bank its own stock, as security, not for a pre-existing debt, but for a present loan, recover from such bank the value of the stock, upon the theory of conversion, when the bank has sold the same and applied the money to the debt for which it was pledged? In such case, is the bank a preferred creditor to the extent of the proceeds of such stock, or must it share the fate of unsecured creditors of the deceased, to whom the laws of Ohio direct distribution *pro-rata*, of the unpledged assets of the deceased? The Court below charged

that the bank was prohibited, by the currency act, from receiving its own stock as collateral for a present loan of money, and that the lender could take advantage of the inhibition.

This Court has decided, in the case of *National Bank* v. *Matthews*, 98 U. S. 621, that the inhibition imposed upon national banks, against lending money upon mortgage of real estate, does not entitle the lender to reclaim the value of the land, or to treat the mortgage as void, but that this is the right of the United States only.

The proposition which we make in this case is that there is a necessary and very important distinction between loans made by national banks upon the security of real estate, and loans upon the security of their own stock, which requires a different conclusion in the two cases.

First:—The language of the statute reqires a different conclusion. Section 5137, under which the case of *National Bank* v. *Matthews* was decided, is in the following language:

"A national banking association may purchase, hold, and convey real estate for the following purposes, and no other. * * * Second, such as shall be mortgaged to it in good faith, by way of security for debts previously contracted."

While it is obvious that this language renders a loan upon mortgage of real estate by a national bank, *ultra vires*, it does not, at least not explicitly, indicate a legislative purpose that the mortgage itself shall accomplish no legal result whatever, or, in other words, be absolutely void.

Quite different is section 5201, which forbids a loan or discount by a national bank upon the security of its own capital stock. This is its language:

"No association shall make any loan or discount on the security of its own capital stock, *nor be the purchaser or*

holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall within six months from the time of purchase be sold or disposed of at public or private sale, or in default thereof, a receiver may be appointed to close up the business of the association according to section 5234."

The penalty imposed in the last sentence, namely, the appointment of a receiver, obviously relates only to the non-sale or disposal within six months, from the time of its purchase, of stock lawfully purchased or acquired.

The language on which we rely, which is decisive, as it seems to us, is that which shows that Congress were not content even with the peremptory negative,

"no association shall make any loan or discount on the security of its own capital stock,"

although this would, we think, be sufficient for the purpose;—proving that Congress did not, as in section 5137, confine itself to merely affirmative words, which might make the transaction *ultra vires*, leaving, to the United States only, the function of punishment, by withdrawal of chartered rights, in case of such violation of the charter;—but to put it beyond doubt that the act of acquiring ownership of its own shares, except as necessary security for a past debt, should be utterly void and of no effect;—in other words, to put it beyond doubt, that, in case the shares of its own capital stock were made the basis of a loan or discount, while the loan or discount might, perhaps, be valid, as being made merely on forbidden security, and not itself, apart from that security, inhibited, the act of pledge of such security should be absolutely void and inoperative as against the pledgor, the emphatic words were added,

"nor be the purchaser or holder of any such shares."

The word "holder," here used, is large enough to include holding by way of pledge. It does not mean holder by way of legal title merely, but by way of legal or equitable title. The statute provides that no bank shall *be* the holder, and if no bank can be the holder, or, in other words, if no bank can occupy the position, at law or in equity, of holder, then it follows that as against the pledgor the act is void, for if the bank be not the holder, the pledgor clearly remains such.

It may perhaps be said that the object of this sentence is to prevent the bank from acquiring title for its own right, and not by way of collateral security. If this were so the words "or holder" would not have been used. A pledgee is a holder. The word "purchaser" was enough to prevent the bank from acquiring the title for its own use, uncoupled with a trust. The word "holder" was added to the word "purchaser," to prevent the bank from becoming interested in such certificate of shares, whether such interest might be as pledgee or as owner.

Secondly:—The reasons which apply to these two legislative provisions require different conclusions. The object of preventing the investment of the assets of national banks in mortgages upon real estate, is stated by Mr. Justice Swayne, thus, in *National Bank* v. *Matthews*, 98 U. S., page 626:

"The object of the restriction was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce, to deter them from embarking in hazardous real estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under

these circumstances the defence of *ultra vires*, if it can be made, does not address itself favorably to the mind of the chancellor."

But the reason of the rule which forbids the loan by a national bank, upon its own shares, is, also, because such loan has a tendency to withdraw, from the creditors of the bank, their proper security for the claims they hold against it. By such loan the bank is guilty of hari-kari, or at least of an attempted suicide, probably resulting in *mayhem*. If a bank can become the holder of some of its own shares, it can become the holder of all, and thus be without share-holders, and without the double liability which Congress has appointed, as one of its resources, by way of security for creditors. Such loans are secret, unknown to the public, and if permitted, the natural tendency will be to convert good fruit into apples of Sodom, an apparently flourishing into a really insolvent bank, without the security which section 5151 intended to provide for its creditors.

"Sec. 5151. The share-holders of every national banking association shall be held individually responsible equally and ratably, and not one for another, for all contracts whatever, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

In *Bank* v. *Lanier*, 11 Wall., page 374, Mr. Justice Davis says:

"And in looking into this act, we find these associations expressly prohibited from making any loan or discount on the security of the shares of their own capital stock. And so marked is the policy of Congress on this subject, that it does not allow a bank to become the purchaser of its shares at all, unless absolutely necessary to prevent loss on a debt previously contracted in good faith, and not then for a longer period than six months. It is easy to see that if the

power were given to a bank to loan money on the security of its shares, it would imply also a power to become the owner of those shares, and this Congress intended to guard against.

These institutions were created to subserve public purposes, and not the mere private interests of their stockholders. And in no better way could this object be attained than by placing share-holders, in their pecuniary dealings with the bank, on the same footing with other customers. Besides, how could the capital of the bank be kept available for active use, if the share-holder, who had pledged his stock for borrowed money, should be unable to meet his obligation? To the extent of the debt the capital would be withdrawn, and it is hardly possible that this could be the case for any length of time, were the debt secured outside of the shares of the bank."

In *Coppin* v. *Greenlees and Ransom Company*, 2 Ohio Law Journal, 583, a case which will be reported in 38 Ohio State, an action was brought by a stockholder of a manufacturing association, upon a contract by which the corporation agreed to buy his stock. The Supreme Court of Ohio held the contract void, although, in the Ohio statutes, there is no express provision against contracts of this kind. The reasons for this conclusion are thus stated by Judge McIlvaine:

"But, however that may be, the right of a corporation to traffic in its own stock at pleasure, appears to us to be inconsistent with the principle of the provisions of the present constitution, article 13, section 3, which reads as follows: 'Dues from corporations shall be secured by such individual liability of stockholders, and other means as may be prescribed by law, but in all cases each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal to such stock.' Now, it is just as plain that a business or trading corporation can not exist without stock and stockholders, as it is that the creditors of such corporation are entitled to the security named in the constitution. *State ex rel. Att'y-Gen.* v. *Sherman*, 22 Ohio St. 411. The corporation itself can not be a stockholder of its

own stock within the meaning of this provision of the constitution. Nobody will deny this proposition. And if a corporation can buy one share of its stock at pleasure, why may it not buy every share? If the right of a corporation to purchase its own stock at pleasure exists, and is unlimited, where is the provision intended for the benefit of creditors? This is not the security to which the constitution invites the creditors of corporations. I am aware that the amount of stock required to be issued is not fixed by the constitution or by statute, and also that provision is made by statute for the reduction of the capital stock of corporations; but of these matters creditors are bound to take notice. They have a right, however, to assume that stock once issued, and not called back in the manner provided by law, remains outstanding in the hands of stockholders, liable to respond to creditors to the extent of the individual liability prescribed. In this view it matters not whether the stock purchased by the corporation that issued it becomes extinct, or is held subject to be reissued. It is enough to know that the corporation, as purchaser of its own stock, does not afford to creditors the security intended. And surely, if the law forbids the organization of a corporation without stock, because the required security is not furnished, it can not be, that having brought the corporation into existence, it invests it with power to assume at pleasure the identical character or relation to the public, that was an insurmountable objection to the giving of corporate existence in the first place."

It may be added further, that to permit the officers or directors to purchase or take in pledge the shares of the bank, would be to permit the reduction of the capital of the bank, at least temporarily, without taking the steps for that purpose prescribed by section 5143.

It is clear, therefore, that motives of public policy of a widely different, and far more stringent character forbid national banks from taking their own shares in pledge, to those which apply to loans upon mortgages of realty. The latter may be held voidable at the instance of the United States only, without weakening the force of the argument which denounces the former as absolutely void. In the

case of real estate mortgages, the creditors of the bank are assisted, not injured, by maintaining the security, even after foreclosure, and even if the bank be compelled to purchase the land, but when a bank takes a pledge of its own stock, it acquires nothing whatever by way of security for its creditors, and has therefore, in effect made an unsecured loan, so that it is no hardship so to treat it. Upon the proportion of the assets of the bank represented by the shares of stock, indeed upon all the assets, the bank's creditors had as perfect recourse, in case of necessity, before as after the pledge of the stock. While, as soon as the stock has been sold, if purchased by the bank, the double liability upon that amount of stock is entirely withdrawn from the creditors.

Thirdly:—The decisions of this Court require that different conclusions shall be derived from the different sections of the statute. In the case of *Bank* v. *Lanier*, *ut supra*, Lanier and Handy recovered against the First National Bank of South Bend, because that bank refused to permit a transfer of certain of its shares to them. The *first* and *third* pleas in bar asserted the very defence made in this case below, and therefore it does not seem to us now possible that this Court can reverse the judgment of the Circuit Court, unless your Honors are prepared to overrule the decision in the case of *Bank* v. *Lanier*. Issue was taken by demurrer to the *first* and *third* pleas, and the demurrer was sustained by the Circuit Court. The exception on this ground was the basis of the first point decided by this Court. These pleas averred that the stock was pledged by Culver, the owner, as security for deposits to be made by the bank with his banking house, Culver, Penn & Co., of New York, and that he had given a power of attorney authorizing sale, under which fifty shares had actually been sold, and the proceeds applied to the debt before Culver assigned the

stock certificates to Lanier and Handy, and that the remaining shares had been sold, and the proceeds applied to the debt, before the bank had notice that they were so assigned. Culver's original holding was one hundred and fifty shares. Of this Lanier and Handy had purchased one hundred and thirty-eight, after, as the pleas showed, fifty of the original one hundred and fifty shares had been sold, and the proceeds applied to the debt for which the stock had been pledged to the bank. The only difference, between that case and this, is, that the actual possession of the evidences of the stock, namely, the certificates, remained with Culver after his pledge to the bank, and that the certificates contained a provision that the shares should be transferable only on their surrender. It follows, from this statement, that the bank, by this pledge, had acquired all the right that Culver could give, independently of the actual delivery of the certificates. We do not think it necessary to do more than suggest that this transaction would have vested in the bank at least an equitable lien on the shares had it not been for the explicit language of the act of Congress. But this Court held, notwithstanding these admitted facts, as follows: (Opinion of Judge Davis, 11 Wall. 375.)

"Without pursuing the subject further, it is clear that the contract between the South Bend bank and Culver was illegal, and cannot, therefore, be pleaded in avoidance of any duty imposed on the bank. It would seem, from the date of the certificates issued to Culver, that, as soon as he took the stock he pledged it, and the bank is therefore without the excuse of endeavoring to secure a pre-existing debt contracted in good faith. The contract in its inception was in violation of law, and the bank cannot complain if it is made to suffer in consequence of it."

An examination of the opinion shows that this Court passed upon two propositions. *First*, it was held that the pledge was illegal, and *secondly* that, had it been legal, the

holder of the stock certificates would have acquired a better title than the bank. But the fact that the second proposition was decided does not weaken the force of the case as an explicit authority upon the first.

In *Bullard* v. *Bank*, 18 Wall. 589, *Bank* v. *Lanier* was affirmed, and some words were added in confirmation of a view originally expressed in *Bank* v. *Lanier*, founded upon the fact that the 36th section of the act of 1863, which denied to any share-holder in any national banking association the right of transfer or sale of his shares as long as he owed the bank, was omitted from the act of 1864, under which the Eagle Bank, defendant in error, was organized, and was expressly repealed thereby. The South Bend Bank, plaintiff in error, in *Bank* v. *Lanier*, had been organized under the currency act of 1863, and claimed the benefit of the 36th section, a claim which Mr. Justice Davis, on page 376, repelled.

Mr. Justice Strong, arguing, 18 Wall. 595, upon this distinction between the two statutes, speaking of the by-law which was sought to be enforced by the *second* plea, in the case of *Bank* v. *Lanier*, says:

"It is, therefore, manifest that it was not the repeal of the 36th section which caused the by-law to fall. It fell because it was considered a regulation inconsistent with the new currency act, the policy of which was to permit no liens in favor of a bank upon the stock of its debtors."

Again, upon page 596, discussing the 5th section of the act of 1864, Mr. Justice Strong says:

"And if such a grant could be implied from the words used by Congress, the implication would be in direct opposition to the policy indicated by the repeal of the 36th section of the act of 1863, and the failure to re-enact it, as well as by the provisions of the 35th section, which prohibit loans and discounts by any bank on the security of the shares of

its own capital stock, and prohibit also every bank from purchasing or holding any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith. Surely an implication is inadmissible which contradicts either the letter or the spirit of the act. Surely when the statute has prohibited all express agreements for a lien in favor of a bank upon the stock of its debtors, there can be no implication of a right to create such a lien from any thing contained in the 5th section."

For these reasons, we insist that the judgment below should be affirmed.

Respectfully submitted,

HOADLY, JOHNSON & COLSTON,

Attorneys for Defendants in Error.

CINCINNATI, *March* 1, 1883.